



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 53 OF 2008

RE: ESTATE OF TERESIA JEMAIYO BITOK (DECEASED)

LINUS KIBOR KIPTALAM.....OBJECTOR/APPLICANT

VERSUS

ELIZABETH BITOK.....1ST PETITIONER/RESPONDENT

VINCENT BITOK.....2ND PETITIONER/RESPONDENT

PATRICK KIPKEMEI BITOK.....3RD RESPONDENT

TONNY KIBICHIY BITOK.....4TH RESPONDENT

RULING

1. The objector prays that the respondents be committed to civil jail for disobeying the order made on 18th February 2013. The order had commanded that the estate of the deceased be *preserved* pending hearing of the objector's application of even date. The respondents deny breaching the order.

2. The deceased, Teresia Jemaiyo Bitok, died intestate on 22nd April 2006. On 27th August 2009, the High Court issued a grant of letters of administration to the two petitioners. The grant has not been confirmed. On 13th September 2012, the objector brought proceedings to annul the grant.

3. The present notice of motion is dated 23rd April 2014. The primary facts are set out in the affidavit of the objector of even date. He deposes as follows-

“2. THAT the deceased to whose estate these proceedings relate was my sister.

3. THAT following my complaint the Kipkarren Division panel of elders met on 11th October 2000 and after their deliberations awarded me the land parcel known as Nandi/Kipkarren/Salient/245 out of which I was to leave 5 acres with [sic] the deceased.

4. THAT the deceased then raised objections to my being registered as the proprietor as per the Tribunal's award. She subsequently died before the said property was transferred to my name.

5. THAT the 1st and 2nd respondents thereafter filed a petition dated 8th May 2008 seeking letters of

administration in respect of her estate without disclosing my interest in the aforesaid property. A grant was issued on 27th August 2009.

6. THAT I filed a summons for revocation of the grant on 14th September 2012.

9. THAT I was present in court with my advocate on 18th March 2013 whereupon the court directed that a fresh date be fixed in the registry on a priority basis and further that the estate be preserved. The respondent's advocate was in court when the order was issued. None of the respondents was in court then.

10. THAT nonetheless, the order was extracted and served upon the respondents on 27th March 2013. The 3rd and 4th respondents acknowledged service on their own behalf and on behalf of the 1st and 2nd respondents who are their siblings. An affidavit of service was prepared by the process server Mr. David Kipyegon.

11. THAT inspite [sic] of the service and the fact that the respondents' advocate was in court when the orders were issued, and the orders were also served upon the respondents personally, they still went ahead to lease out the suit property, namely, Nandi/Kipkarren Salient/245 to third parties in the year 2013 and also felled and sold indigenous trees growing on the land for burning [sic] charcoal. The following are the persons to whom the land was leased in 2013: Kipkogei Ruto - 1 acre; Joel Rugut - 5.3 acres; Christopher Chumba - 25 acres; Isaac Rono - 3 acres.

12. THAT they have also leased out the said land this year to the aforesaid persons and the trees are still being wantonly destroyed in utter contravention of the court orders in force with clear intention of defeating my claim to the said parcel. Part of the land has been ploughed and maize planted thereon while others have been ploughed but yet to be planted”

4. The application is contested. There is a replying affidavit sworn by the 1st petitioner and filed on 7th July 2014. She avers that she is a daughter of the deceased and the administrator of the estate. She states that she has full authority of the other beneficiaries who are also respondents. She avers that before the deceased died she challenged the decision of the Land Disputes Tribunal. The 1st petitioner stated that the decision was quashed by the High Court on 14th July 2003. She therefore contends that the objector's claim over the land has no legal foundation.

5. In response, the objector has filed a supplementary affidavit. It is sworn on 15th August 2014. He does not deny that the decision of the Tribunal was quashed. But he avers that he has lodged an application dated 31st March 2004 challenging the order. He contends the order was obtained *ex parte* and contrary to the rules of natural justice.

6. On 22nd June 2015, I heard learned counsel for the parties. I have carefully considered the notice of motion, pleadings, depositions, documents and the rival submissions.

7. Section 5 of the Judicature Act grants this Court jurisdiction to punish for contempt. The procedure is set out in Order 52 Rule 5 of the Civil Procedure Rules of the Supreme Court of England as amended from time to time. The latest amendments dispense with application for leave to bring proceedings for contempt of court orders or abuse of court process.

8. The jurisdiction is exercised to protect the dignity of the court. It is meant to ensure that the streams of justice are kept pure. A party aggrieved by an order of the court should move to review, set aside or appeal the decision; not to disregard or disobey it. In *Hadkinson Vs. Hadkinson* [1952] 2 All ER 567 at 569 it was stated as follows-

“A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge

whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed”.

9. There is a long line of local decisions upholding that position. See for example *Mutika v Baharini Farm Ltd* [1985] KLR, 227, *Benard Kongo Njau v City Council Of Nairobi & Another*, Nairobi High Court ELC Case No. 495 of 2009 (unreported), *Shah & Another t/a Lento Agencies v National Industrial Credit Bank Ltd.* [2005] 1 KLR 300. In certain instances, a contemnor will not even be heard on review until he purges the contempt. See *Mawani v Mawani* [1977] KLR 159, *Kasturilal Laroya Vs Mityana Stample Cotton Company Ltd* [1958] E.A 194. I thus find that the motion is properly before the court.

10. Contempt of court is a criminal offence. The standard of proof is quite high. The punishment can lead to loss of liberty. As a result, it must be proved that the contemnors were served with the court order; and, that they disobeyed it. It must be clear from their *overt acts* that they *intended* to breach the order of court.

11. Applying those principles here, I find as follows. It is common ground that an *interim* order was granted by the High Court on 18th February 2013. The order provided that “*a new hearing date for the application dated 18th February 2013 shall be taken at the Registry on priority basis; and, the estate of the deceased should be preserved*”.

12. The next key question is whether it was served upon the respondents. From the affidavit of service of David Kipyegon sworn on 2nd April 2013, it is clear that the 1st and 2nd petitioners were *never* served. The affidavit of service states as follows-

“That on 27th day of March 2013, I received copies of the order issued on 27th day of March 2013 from the firm of Chepkong'a & Co. Advocates with instructions to serve the same to the Petitioners/Respondents herein.

“That on the same day accompanied by the applicant [I] proceeded to the homes of the petitioners namely Patrick Bitok and Tony Bitok situated at Saliant Kipkarren. Applicant pointed out to me the respective houses of the said petitioners, where upon arrival, I met them and upon introduction and my purpose of my visit, the said Tony Bitok accepted service at 12.20 pm by signing on the back of my original copy of the Order issued on 22nd day of March 2013.

“That also the said Patrick Bitok accepted service at 11.00 am but refused to sign on my copy of the Order issued on 22nd day of March 2013 which I return to court duly served”.

13. It is thus clear beyond peradventure that the 1st and 2nd petitioners were never served *personally* with the order of court. It follows as a corollary that the contempt proceedings cannot lie against them. The only persons served were the 3rd and 4th respondents. Even as relates to the latter, the original copy of the order that was served was not annexed to the affidavit of service as required by Order 5 of the Civil Procedure Rules 2010. This is material because only the 4th respondent is alleged to have *signed*. I am thus not fully satisfied with the service upon the 3rd respondent.

14. The next important question is whether the 4th respondent or any of the respondents committed acts of contempt. The acts complained of at paragraph 12 of the supporting affidavit are *leasing out the land; wanton destruction of trees; and, ploughing and planting maize on a section of the land*. The affidavit does not *pinpoint* who among the four respondents has leased out the land to whom; destroyed trees; or ploughed and planted maize. From an evidential standpoint, I am then not satisfied that the contempt has been proved as against each of the respondents. Like I stated earlier contempt of court is a criminal offence. The standard of proof is quite high. It must be *proved* that the contemnors were served with the court order; and, they disobeyed it. It must be clear from their *overt acts* that they *intended* to breach the

order of court.

15. Quite apart from that, the objector's claim on the land has been cast into *doubt*. I have studied the order of the High Court dated 14th July 2003. It was in the following terms-

“An order of certiorari do issue to bring to this Honourable court and quash the decision of the Land Disputes Tribunal for Kipkarren between LINUS KIBOR TALAM and TERESA BITOK dated 27th October, 2000 in respect of land parcel number NANDI/KIPKARREN/245”.

16. The substratum upon which the objector's interest is founded has *collapsed*. I am alive that the objector has lodged an application dated 31st March 2004 challenging the above order. The application remains undetermined. It would be unjust in the circumstances to punish any of the respondents when the objector's claims over the suit land are *moot*.

17. There is another matter that prejudices the present motion: the objector had presented a similar application by way of summons dated 16th April 2013. That application was never prosecuted. No reasons are proffered for that state of affairs. The record shows that the court had only advised the objector that *no* leave was required to bring contempt proceedings. The objector has now presented this motion seeking *similar* reliefs. To that extent, I also find that the present motion is an abuse of court process. See *Nairobi City Council vs. Thabiti Enterprises Limited*, Civil Appeal No. 264 of 1996 (unreported).

18. Lastly, the jurisdiction to punish for contempt should be exercised with restraint. It cannot be better expressed than through the words of the Master of the Rolls in *Re Clement*, cited with approval in *Re Maria Anne Davies* (1988) 21 QBD 236-

“I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably, that will be discovered after consideration to be the true measure of the exercise of the jurisdiction”.

19. The upshot is that the objector's notice of motion dated 23rd April 2014 is hereby dismissed. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 28th day of July 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

Mr. Magut for the objector/applicant.

Mr. Aseso for the respondents.

Mr. J. Kemboi, Court clerk.